

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the Application of:

Art Unit: **2856**

Andrew R. WEISENBERGER

Application Number: **10/621,860**

Examiner: **Rodney T. Frank**

Filed: **July 16, 2003**

Confirmation Number: **1759**

For: **BUILDING MOISTURE CONTENT CERTIFICATION SYSTEM
AND METHOD**

Attorney Docket Number: **062373**

Customer Number: **38834**

SUBMISSION OF APPEAL BRIEF

Mail Stop: Appeal Brief – Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, Virginia 22313-1450

November 16, 2009

Sir:

In accordance with the provisions of 37 CFR 41.37, Appellants submit the following:

A submission of an Appeal Brief with the required fee is being filed concurrently herewith. If any additional fees are due in connection with this submission, please charge Deposit Account No. 50-2866.

Respectfully submitted,

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

APPEAL BRIEF FOR THE APPELLANT

Ex parte Andrew R. WEISENBERGER et al. (Applicant)

BUILDING MOISTURE CONTENT CERTIFICATION SYSTEM AND METHOD

Application Number: 10/621,860

Filed: July 16, 2003

Appeal No.:

Art Unit: 2856

Examiner: Rodney T. Frank

Submitted by:
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November 16, 2009

BRIEF ON APPEAL

(I) REAL PARTY IN INTEREST

The real parties in interest are the inventors of the present application, Andrew R. Weisenberger and Robert A. Weisenberger.

(II) RELATED APPEALS AND INTERFERENCES

It is submitted that there are no other appeals or interferences known to appellant, appellant's legal representative, or assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(III) STATUS OF CLAIMS

This is an appeal from the Examiner's Final Office Action dated October 15, 2008, rejecting claims 1, 5-11, 13-18, 27-30, 35 and 36.

Claims 1, 5-11, 13-18, 27-30, 35 and 36 are all of the claims pending in the present application.

Claims 2-4, 12, 19-26 and 31-34 have been cancelled.

Claims 1, 5-11, 13-18, 27-30, 35 and 36 are rejected.

Claims 1, 5-11, 13-18, 27-30, 35 and 36 are appealed and are set forth in their entirety in Appendix A attached to this Brief on Appeal.

(IV) STATUS OF AMENDMENTS

Subsequent to the Final Office Action dated October 15, 2008, no amendments have been filed.

(V) SUMMARY OF THE CLAIMED SUBJECT MATTER

Appellants invention relates to a building moisture certification system and certification method for measuring and certifying the moisture content of an interior portion of a recently constructed structure and has two independent claims, 1 and 11.

The building moisture certification system and method for certifying an interior portion of a recently constructed structure allows a certification to be provided to all interested parties, which indicates that the interior portion of the structure has been tested as to its moisture content (Specification, page 5, lines 26 through page 6, line 1).

Independent claim 1 recites a method for certifying an interior portion of a structure relative to moisture content (Specification, page 3, lines 25-31), comprising the steps of: measuring a plurality of moisture content levels within said interior portion of the structure (Specification, page 3, lines 32 – page 4, line 9); determining if each of said plurality of moisture content levels is within a desired level (specification, page 5, lines 8-14); and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level (Specification, page 5, lines 14-18), wherein said moisture step includes taking measurements of said moisture content levels around at least

one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, which are included within said interior portion of said structure (Specification, page 4 lines 11-19).

Independent claim 11 recites a building moisture certification system (Specification, page 3, lines 15-31), comprising: moisture measurement apparatus for measuring a plurality of moisture content levels within at least an interior portion of a building to be certified (Specification, page 3, lines 32 – page 4, line 9); determining means for determining if each of said plurality of moisture content levels is within a desired level (Specification page 5, lines 8-14); and issuing means for issuing a moisture level compliance certificate if the result of said determining means is that each of said plurality of moisture content levels is below the desired level (Specification, page 5, lines 14-18) wherein said moisture measurement apparatus is used to take measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, which are included within said interior portion of said building (Specification, page 4 lines 11-19).

(VI) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The rejection of claims 1, 5-11, 13-18, 27-30, 35 and 36 under 35 U.S.C. §103(a) based on Rynhart et al. (USP 6,340,892) in view of Skidmore et al. (US Patent Publication 2003/0040934).

(VII) ARGUMENT

The prior art rejection is of claims 1, 5-11, 13-18, 27-30, 35 and 36.

The rejection of claims 1, 5-11, 13-18, 27-30, 35 and 36 under 35 U.S.C. §103(a) based on Rynhart et al. in view of Skidmore et al. is improper and should be overturned.

Appellants claim 1 relates to a method of certifying that the moisture content of the interior portion of a building or structure, which has been newly constructed or renovated and is then later sealed, is below a particular threshold moisture content in order to certify to all parties involved in a transaction for the particular building or structure that the interior portion is free from mold, since mold is unable to survive under the particular threshold moisture content level. In order to be able to certify that the interior portion of a newly constructed building is free from mold, claim 1 requires *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at*

least one wall and at least one ceiling, all of which are included within said interior portion of said structure. Independent claim 11 includes similar features.

With regard to the applied prior art, while Rynhart may disclose using a meter 1 for measuring the moisture content for a range of different materials, Rynhart fails to include any type of disclosure or teaching regarding a measuring step which includes taking measurements for moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall, and at least one ceiling, all of which are included within an interior portion of the structure, determining if each of the plurality of moisture content levels are within the desired level and issuing a moisture level compliance certificate if the result of the determining step is that each of the plurality of moisture content levels is below the desired level.

The Examiner has failed to specifically rely on any portion of the Rynhart reference which teaches the measuring step which includes taking measurements of the moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall, and at least one ceiling, all of which are included within the interior portion of said structure, and determining if each of said plurality of moisture content levels is within a desired level.

Accordingly, it is submitted Rynhart fails to disclose or fairly suggest the features of claim 1 concerning *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein*

said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.

In response to the above arguments, the Examiner takes the position that:

Further still, with respect to making such measurements at particular points such as window and door frames, ceilings, floors, etc., the applicant has not shown anywhere in the specification where these measurements are not a typical measurement process known in the art. In other words, there is no disclosure of any new method of performing moisture measurements for a home inspection, simply a method of taking these measurements and presenting them in a particular format of a compliance certificate. Thus, the measurement points would be obvious to one of ordinary skill in the art at the time of the invention, specifically since any openings such as a window or door would be of particular interest since they would be a prime location for possible moisture intrusion.

In view of the above, it is clear that the Examiner is not relying on the Rynhart for teaching the features of claim 1 regarding *wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.* Instead, the Examiner appears to be taking the position that the features of the measuring step of claim 1 are typical parts of a home inspection. However, the Examiner has failed to provide any reference, teaching or evidence to support this assertion. Without such evidence, it is submitted that the Examiner has clearly failed to meet his burden of establishing a *prima facie* case of obviousness. Moreover, the Examiner's

comments that the measuring points of the measuring step of claim 1 would be obvious to one of ordinary skill in the art at the time of the invention are equally without merit.

First, Rynhart fails to disclose or fairly suggest any measurement for either a door or a window. Thus, the Examiner again has failed to provide any reference, teaching or evidence to support this assertion and again has clearly failed to meet his burden of establishing a *prima facie* case of obviousness. In other words, the only teaching of taking moisture measurements *around at least one window frame and at least one door frame* is the Appellants' own specification, which of course amounts to **impermissible hindsight** by the Examiner.

Second, the Examiner has failed to even address the features of claim 1 concerning *wherein said measuring step includes taking measurements of said moisture content levels ... along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.*

For at least these reasons, it is submitted that the reliance on Rynhart is clearly lacking and withdrawal of the rejection based on Rynhart is respectfully requested.

With regard to the reference of Skidmore, it is respectfully submitted that such reference fails to cure the above-noted drawbacks and deficiencies of the Rynhart reference.

That is, while Skidmore may disclose that an inspection database 36 is incorporated in the computer readable medium 34, it is submitted that the inspection database 36 fails to include an inspection item that includes information concerning *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance*

certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.

Instead, Skidmore discloses in part in paragraph [0020] the following:

Foundation inspection items 40G include information concerning the moisture penetration, wall material, girders, sub-floor, sump pumps for crawl spaces, ventilation, and insulation. ...

Interior inspection items 40L include information concerning the rooms within the house, the floors and walls, any alarms, the ceiling, and any stairs or doors.

However, while the foundation inspection item 40G may include information concerning the moisture penetration of the foundation, it is submitted that Skidmore fails to disclose measuring a plurality of moisture content levels within an interior portion of the foundation structure. Instead, it is submitted that a home inspector would merely perform a visual inspection of the foundation to determine if there is penetration of ground moisture in the foundation.

Moreover, it is submitted that Skidmore clearly fails to disclose or fairly suggest that the inspection of the foundation includes a measuring step that *includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.* That is, it is submitted the foundation inspection items 40G simply does not include information concerning moisture content levels that are measured around a window frame and a door frame, and along a wall and a ceiling.

Further, while the interior inspection items 40L may include information concerning the rooms within the house, the floors and walls, any alarms, the ceiling, and any stairs or doors, Skidmore fails to provide any teaching or suggestion concerning determining the existence of moisture within the rooms of the house, the floors, walls and doors.

As such, it is submitted that Skidmore's silence with regard to moisture existence with within the rooms of the house, the floors, walls and doors *teaches away* from one of ordinary skill in art including a measuring step that *includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.*

In response to the above arguments, the Examiner takes the position that:

The Skidmore reference discloses moisture measurements being taken as part of a home inspection. The examiner submits that one of ordinary skill in the art would be motivated to take moisture measurements around various parts of a home where moisture and mold issues are relevant. With this in mind, since Skidmore discloses making measurements to the interior of the structure, then one of ordinary skill in the art would know to make the measurements around all the particular points of interest, and thus Skidmore is of particular relevance to making such measurements for a home. The applicant does acknowledge on page 7 of the response that Skidmore does disclose obtaining information with respect to the interior of rooms in a house, the floors, walls, and ceilings. How the applicant can argue that this inspection would not include moisture of the same area when that is considered a part of a standard home inspection is not clear to the examiner. Further, paragraph [0023] specifically discloses a determination performed by a home inspector of the compliance of various aspects of the home inspection, one of said aspects being moisture level measurements. Again, as pointed out above, since the applicant is making no claims to providing any new or novel inspection method, then the points of the interior of the home would be understood to be measure for moisture content levels. With this in mind, the arguments against Skidmore alone are not persuasive.

However, it is submitted that the Examiner is clearly mis-characterizing the teachings of Skidmore, since the reference is completely silent with regard to taking moisture contents measurement as part of home inspection. That is, there is no disclosure in Skidmore of a home inspector taking moisture content measurements during an inspection. In other words, the Examiner's assertion that, "[t]he Skidmore reference discloses moisture measurements being taken as part of a home inspection," is not supported by the disclosure of Skidmore. Accordingly, the entire premise of the Examiner's reliance on Skidmore is simply meritless.

Further, the Examiner's assertion "that one of ordinary skill in the art would be motivated to take moisture measurements around various parts of a home where moisture and mold issues are relevant," is not supported by any reference, teaching or other evidence. That is, the Examiner has again clearly failed to meet his burden of establishing a *prima facie* case of obviousness. In other words, the only teaching of taking moisture measurements *around at least one window frame and at least one door frame* is the Appellants' own specification, which of course amounts to **impermissible hindsight** by the Examiner.

Further, the Examiner appears to be taking the position that the features of the measuring step of claim 1 are typical parts of a home inspection. However, the Examiner has failed to provide any reference, teaching or evidence to support this assertion. Without such evidence, it is submitted that the Examiner has clearly failed to meet his burden of establishing a *prima facie* case of obviousness. Moreover, the Examiner's comments that the measuring points of the measuring step of claim 1 would be obvious to one of ordinary skill in the art at the time of the invention are equally without merit.

Moreover, the Examiner has failed to even address the features of claim 1 concerning *wherein said measuring step includes taking measurements of said moisture content levels ... along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.*

For at least these reasons, it is submitted that the reliance on Skidmore is clearly lacking and withdrawal of the rejection based on Skidmore is respectfully requested.

In view of the above, it is submitted that even if, assuming *arguendo*, Rynhart and Skidmore can be combined in the manner suggested by the Examiner, such combination would still fail to teach or fairly suggest the features of claim 1 regarding *measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.*

Application No.: 10/621,860
Art Unit: 2856

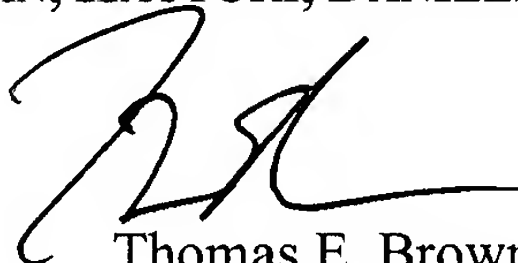
Appeal Brief
Attorney Docket No.: 062373

(VIII) CONCLUSION

If this paper is not timely filed, appellants hereby petition for an appropriate extension of time. The fee for any such extension may be charged to Deposit Account No. 50-2866, along with any other additional fees that may be required with respect to this paper.

Respectfully submitted,

WESTERMAN, HATTORI, DANIELS & ADRIAN, LLP

A handwritten signature in black ink, appearing to be 'TEB', written over a horizontal line.

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(IX) CLAIMS APPENDIX

Claim 1: A method for certifying an interior portion of a structure relative to moisture content, comprising the steps of:

measuring a plurality of moisture content levels within said interior portion of the structure;

determining if each of said plurality of moisture content levels is within a desired level; and

issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level;

wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure.

Claims 2-4 (Cancelled).

Claim 5: The method according to claim 1, wherein said structure is a new construction.

Claim 6: The method according to claim 1, wherein said structure is a remodel construction.

Claim 7: The method according to claim 1, wherein said structure is an existing structure in absence of significant new construction or remodel construction.

Claim 8: The method according to claim 1, wherein said structure is a residential structure.

Claim 9: The method according to claim 1, wherein said structure is a single family residential structure.

Claim 10: The method according to claim 1, wherein said desired level is 20% or lower.

Claim 11: A building moisture certification system, comprising:

- moisture measurement apparatus for measuring a plurality of moisture content levels within at least an interior portion of a building to be certified;
- determining means for determining if each of said plurality of moisture content levels is within a desired level, and
- issuing means for issuing a moisture level compliance certificate if the result of said determining means is that each of said plurality of moisture content levels is below the desired level

wherein said moisture measurement apparatus is used to take measurements of said moisture content levels around at least one window frame and at least one door frame, and along at least one floor, at least one wall and at least one ceiling, which are included within said interior portion of said building.

Claim 12 (Cancelled).

Claim 13: The system according to claim 11, wherein said desired level is 20% or lower.

Claim 14: The system according to claim 11, wherein said building is a remodel construction.

Claim 15: The system according to claim 11, wherein said building is a residential structure.

Claim 16: The system according to claim 11, wherein said building is a single family residential structure.

Claim 17: The system according to claim 11, wherein said building is an existing structure in absence of significant new construction or remodel construction.

Claim 18: The system according to claim 11, wherein said building is a new construction.

Claims 19-26 (Cancelled).

Claim 27 (Original): The method according to claim 1, wherein said building is an office.

Claim 28 (Original): The system according to claim 11, wherein said building is an office.

Claim 29 (Original): The method according to claim 1, wherein said desired level is 18% or lower.

Claim 30 (Original): The system according to claim 11, wherein said desired level is 18% or lower.

Claims 31-34 (Cancelled).

Claim 35: The method according to claim 1, wherein a moisture level non-compliance certificate is issued if the results of said determining step is that at least one of said plurality of moisture contents levels is not below the desired level.

Claim 36: The system according to claim 11, wherein said issuing means issues a moisture level non-compliance certificate if the results of said determining step is that at least one of said plurality of moisture contents levels is not below the desired level.

Application No.: 10/621,860
Art Unit: 2856

Appeal Brief
Attorney Docket No.: 062373

(X) EVIDENCE APPENDIX

n/a

Application No.: 10/621,860
Art Unit: 2856

Appeal Brief
Attorney Docket No.: 062373

(XI) RELATED PROCEEDINGS APPENDIX

n/a